

LABOR & EMPLOYMENT

A ROUNDTABLE DISCUSSION



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The San Fernando Valley Business Journal has once again turned to some of the leading employment attorneys and experts in the region to get their assessments regarding the current state of labor legislation, what changes have come to the labor law landscape in light of the COVID pandemic, the new rules of hiring and firing, and the various trends that they have been observing, and in some cases, driving.

Here are a series of questions the Business Journal posed to these experts and the unique responses they provided – offering a glimpse into the state of business employment in 2022 – from the perspectives of those in the trenches of our region today.

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What implications will the COVID-19 situation of the last two years have on employment law in 2022?

HREN: COVID-19 has impacted all areas of the employee/ employer landscape. In 2022, we can expect to see a flurry of litigation concerning COVID related events. For instance, employees have already begun to make claims that they were discriminated against for having COVID-19 or taking time off to recover from its effects. The next slew of litigation will most certainly involve employees who claim discrimination claims against employers who purportedly failed to accommodate their requests to be exempt from vaccinations, COVID-19 testing or face covering policies based on their religious beliefs or medical disabilities.

BENDAVID: More employees are now working remotely, on either a full time or hybrid basis. With the shift to telework, employers are finding it more difficult to comply with California's wage and hour laws, particularly regarding accurate record keeping of hours worked, meal and rest breaks, expense reimbursement, and off-the-clock work. Further, with employees working at home, it is more difficult to manage, train, and counsel employees to ensure they are actually working when they are supposed to and performing to the employer's standards. There are many other unique complications such as protecting the employer's confidential information or that of the employer's customers when employees are working in distant locations, as well as the obligation to maintain a safe workplace. Clearly these are more difficult when the employee is off site.

Do you think remote and hybrid practices that companies were at first forced to apply will continue to become the norm in 2022?

LIGHT: Absolutely. Employers now realize that the vast majority of employees are productive at home. Many employees like it, as it accommodates personal needs such as child care. For example, a hybrid three days in the office/two days at home structure could easily be the norm going forward for many workers. I think it's good for morale and that will support a strong work ethic and productivity. Employers would still have the ability to restrict remote work if the worker isn't productive and could do the work from the office.



BENDAVID: Employers should minimize business travel as much as possible in an effort to mitigate the spread of the virus. If travel is absolutely necessary, follow current guidelines and advisories from the Centers for Disease Control and Prevention (CDC). That means ensuring if possible, that traveling employees are fully-vaccinated, and ensuring employees know they must carry proof of vaccination when going to certain destinations. Whether vaccinated or not, travelers may have to undergo quarantine on arrival or on return, and submit to COVID-19 testing. A lot depends on the destination. If the CDC or state or local public health officials recommend that people who

their workplace. This is not an easy task and employers should consult with counsel to ensure they are up to speed on the ever changing laws in this arena. Additionally, employers need to keep in mind that accommodation requests need to be analyzed on a case by case basis and the inquiries involving each case are highly fact specific. The key is to make sure the employee remains an active part of the discussions concerning accommodations or leave requests, and that the employer properly documents the steps taken and conversations that have occurred on the topic.

Which of California's new employment laws are most likely to land employers in court?

LIGHT: It wasn't a terribly robust year for California employment laws. There were a lot of them (84 by my count) but almost all were either industry specific (no piece rate for garment workers and no quotas for pharmacists, for example) or relatively benign. The one I like the least creates a Penal Code Grand Larceny claim if an employer "willfully" takes employee wages. It's not entirely clear where that line will be drawn and could create claims that are entirely unwarranted for more innocent failures to pay or ignorance of wage and hour laws, for example.

What should employers know about mediation in the context of employment disputes?

BENDAVID: A mediator's goal is to find a resolution that works for both sides. This often means both the employer and the claimant will have the flaws in their respective arguments painfully revealed and that both sides walk away unhappy, but somewhat relieved. An employer will need to consider what it is willing to pay, or whether the price is just too high, such that the employer would rather proceed to court and put the matter into the hands of a jury. Though the process is confidential, should the mediation fail, information revealed during the proceedings could be subsequently disclosed and then used later.

Any suggestions for companies that want to become more proactive in terms of encouraging their employees to get vaccinated?

HREN: Under the Cal-OSHA emergency temporary standards, employers are required to provide training to their employees on a variety of COVID-19 related topics, including encour-

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SUE M. BENDAVID



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HREN: Employees and employers have been dealing with remote work arrangements for almost two years and employees have been accustomed to it. Employers need to remain flexible in this regard in order to attract and retain talent. Many employers have already been faced with the challenges of attempting to get employees back to the pre-COVID arrangements. Employers need to be proactive and work to develop policies and practices that address the needs of employees in this new environment, but also fulfill the operational needs of the workplace.

How should employers handle employee travel needs today?

visit specified locations remain at home for a certain period of time, you are permitted to ask where the employee traveled to and from, even if the travel was personal in nature.

Moving forward, what are some best practices for handling employee leave and accommodation requests related to COVID concerns?

HREN: Employers are faced with a dizzying array of legislation concerning employee leave and accommodation requests related to COVID-19 concerns. We are seeing legislation at the federal, state, county, city and local levels. Therefore, employers must first educate themselves on what laws apply to

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aging employees to get vaccinated and educating them on the benefits of the vaccine. Many employers have gone much further than that and have provided monetary incentives to employees. Some incentives include bonuses or gift cards for those who receive the vaccine or creating a raffle with desirable prizes for those who get vaccinated. Alternatively, other employers have created policies mandating that employees either get vaccinated or become subjected to periodic testing. All of these measures have been effective in increasing the number of vaccinated employees in the workplace.

How do you advise clients regarding the implementation and enforcement of non-competes and other restrictive covenant agreements?

LIGHT: In California, a company generally can't impose true non-compete provisions unless it's a sale of a business and the selling owner is restricted for a period of time. Your best salesperson moves across the street to your biggest competitor; not a lot you can do except monitor to see that they aren't using your materials to solicit your customers and compete unfairly. Have clear language in confidentiality agreements that employees can't use proprietary information to unfairly compete. Make sure to actually keep such information confidential and, for example, password-protected. Employers also generally can't impose restrictions on former employees recruiting existing employees to leave. Review such agreements for incoming employees to ensure that they aren't subject to such provisions from another state – whose laws may be much more favorable to the previous employer. Also, ensure that new hires have not brought anything proprietary from the prior employer that can get both of you in trouble.

What are your views on using arbitration agreements as an alternative to employment litigation?

BENDAVID: Arbitration proceedings are confidential, faster than a jury trial, and binding – both the claimant and the employer must adhere to an arbitrator's decision. But like all decisions regarding the handling of employee claims, arbitration is not a perfect solution for every employment claim. It depends on your tolerance for risk, whether or not you think the claimant could “let it go” or become more reasonable over time, and other factors. Arbitration agreements are often challenged in court and often found unenforceable. They also cannot be used to compel every claim to arbitration (e.g., PAGA wage penalty claims cannot be compelled to a private arbitrator). And, with rates exceeding \$10,000 a day for an arbitrator, some employers find the arbitrator's fees cost prohibitive and would rather use a “free” judge in the Superior Court.

What are the most frequent mistakes made by employers when disciplining employees?

LIGHT: Lack of documentation. Lack of clear examples of the problems noted (“He's not a team player” without any exam-

ples). When making a termination decision, failure to consider prior reviews that generally are more positive than they should be. No one likes confrontation, so reviews tend to be relatively inaccurate or gloss over problem areas with cursory comments. In more severe situations like probation, I like to force the employee to provide a written response on how they think they can do better, how the employer might help them, etc. It shows the employee's commitment to the process and whether they really want to get better and keep their job.

What are the key differences to consider when a potential team-member is either an employee or an independent contractor?

BENDAVID: Think twice before classifying a worker as an independent contractor. Consider the ABC test. To paraphrase: a) Is the worker free from your direction and control? b) Does the worker work outside of your usual course of business? c) Does the worker have their own independently established trade, e.g. do they perform the type of work you contracted them for, for other entities? Also, make sure you review the applicable California Labor Codes to assess whether any possible exemptions to the ABC test may apply and whether you can satisfy the various elements of the exemptions. The burden of proof is on the hiring entity and the potential penalties and damages steep, so give careful consideration before classifying the worker as an independent contractor.

What effect does the increasing number of millennials have on a company's approach to employee relations?

HREN: Millennials represent the largest number of individuals within any generation in the American workplace, far exceeding Generation X and the Baby Boomer generations. As such, their opinions and approach to the workplace will drive workplace culture over the next few decades. Employers need to adapt and create an environment that adequately responds to the needs and wants of this generation. Millennials have already been a driving force in changing the workplace culture on such topics as work/life balance, communication styles, technology developments and new innovations. Employers need to recognize the significant contributions of millennials and adapt to their style of communicating, while also recognizing what motivates this group of individuals in order to ensure long term retention and creation of the next generation of leaders in their organization.

In today's social media environment, what recourse does a company have for employees who are publicly active in political or other potentially controversial viewpoints or causes that are inconsistent with the company's values?

LIGHT: Employers need to be cautious about disciplining employees for off-duty conduct. Various Labor Code sections protect political activities and other private conduct by workers. Employers do have the ability to restrict such activities in the workplace, but it's a tricky area of law and employee relationships when social media views are known by co-workers who don't agree with the views expressed. Employers can take action to minimize discussions in the workplace, but it may be difficult to create a positive work environment among workers with disparate views on such things as race, politics and vaccines. Open discussions with facilitators are an option, but there are no easy solutions to this issue.

How important is sensitivity training in the workplace in 2022?

HREN: Diversity, equity and inclusion are becoming vital components in the workplace and are a more futuristic approach to traditional “sensitivity” training. Understanding these concepts is essential for the long term growth and sustainability of any organization. Providing training on these topics will not only have the effect of increasing workplace morale and productivity, but will foster an environment where management and



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employees will be better able to obtain business and work with all different segments of the population.

How can employers (especially those with smaller companies and facilities) meet the needs of, or accommodate, a growing transgender workforce?

BENDAVID: Communicate with transgender employees, or at least let them know you are ready to communicate. Develop an inclusive environment. Be supportive for employees who are transitioning or identify as transgender, as this can be stressful both for the employees who are transitioning, as well as for their coworkers. Make accommodations when needed, and ensure your workforce knows that discrimination and harassment will not be tolerated. Remind employees about the need to use the employee's name and pronoun of choice, even if they differ from the employee's name and sex at birth.

How has the worker's comp landscape changed in recent times?

LIGHT: I'm not a worker's compensation attorney, but from the general employment law side, it's important that employers understand their obligations when an employee returns to work with restrictions that might be reasonably accommodated after an interactive dialogue. Employers need to remember to give the CFRA and FMLA notices to employees on worker's compensation leave. They all run concurrently and when the 12 weeks of protected CFRA/FMLA leave runs out, the employer has the ability to stop paying medical insurance premiums if it desires to do so. Remember that CFRA now applies to companies with only five employees.

What accommodations must an employer offer to employees who are parents of school age children if there is a school closure due to a violent threat?

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HREN: For employers with 25 or more employees, California law requires that an employer provide unpaid time off to employees to address a “child care provider or school emergency” which is defined to mean that the child cannot remain in a school or with a child care provider due to any one of the following: a) The school or child care provider has requested that the child be picked up, or has an attendance policy, excluding planned holidays, that prohibits the child from attending or requires the child to be picked up from the school or child care provider; b) Behavioral or discipline problems; c) Closure or unexpected unavailability of the school or child care provider, excluding planned holidays; or d) A natural disaster, including, but not limited to, fire, earthquake, or flood. These broad terms would most certainly include a violent threat against the school. In such a case, the employee would be entitled to 40 hours of unpaid time off each calendar year.

ings may change as more states begin legalizing the drug. For now, employers may still make possession or use of marijuana a violation of company policy, especially if the drug is used on company property, or an employee is under the influence while working. Use caution, however, when sending an employee out for a drug test as there are protocols which must be followed prior to doing so (e.g., generally an employer must have a reasonable suspicion that a current employee is under the influence).

LIGHT: They are much more mellow about the topic than they used to be. Some clients no longer test for marijuana and treat it like alcohol. “Just don't show up stoned and don't use during the work day.” Or, if they do test, they work with their testing lab to use a higher threshold for a positive test. A 50 nanoliter level of THC versus a 20 nanoliter level will yield far fewer positive results. I've had clients say that if they tested their



How have the changes in marijuana laws over the last few years affected your clients?

BENDAVID: Historically, courts have been ruling in favor of the employer when plaintiffs claimed they were wrongfully terminated because of marijuana use, mainly because possession and use of marijuana remains illegal under federal law. However, employers should continue to monitor this because court rul-

workforce they would lose half of them. No one can afford that these days.

Would you say that a company's employee handbook is still vital in this day and age or have they become a thing of the past?

HREN: Employee handbooks are a must in any organization. It is the employer's opportunity to describe its culture, procedures and rules of the road. Perhaps more importantly, it is also an employer's first line of defense in employment litigation. Having compliant policies with respect to such things as workplace harassment, meal and rest periods and leaves of absence eviscerate the employee's argument that they were unaware of their rights under the law. Conversely, even small policy mistakes can easily land an employer in court and expose the company to enormous exposure. It is important to make sure employee handbooks are reviewed by competent employment attorneys.

How does a law firm specializing in labor and employment differentiate itself from the competition in 2022?

BENDAVID: Our employment attorneys represent employers and management only in all stages of litigation, whether our clients are considering settlement, mediation or arbitration, or a jury trial. We also handle claims in a variety of jurisdictions (in courts and before government agencies). But even before we get to the stage where an employee makes a claim, we are intent on helping employers reduce the risk of claims being made in the first place. That means helping businesses train their staff, managers, and HR professionals, auditing policies and pay practices, and responding to client questions about compliance. Additionally, we have the benefit of having other lawyers in house with overlapping practice areas in franchise, real estate, mergers & acquisitions, intellectual property, and more.

LIGHT: Answer your phone. Respond to email ASAP. Clients need answers now! A day later, or even several hours later, just isn't workable for most clients these days. Our profession is notorious for slow response and that's not acceptable. Provide practical advice and “Here's what I would do if it were my business.” Clients dislike it when you give them two or three choices and say “it's a business decision.” The attorney is often in a better position to assess risk. We can never eliminate 100% of the risk; no business can. But we can offer informed choices based on experience and risk-assessment.